SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 79

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, A.F.L.; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, A.F.L., AND BUILDING & CONSTRUCTION LABORERS UNION, LOCAL 392, A.F.L., PETITIONERS,

vs.

VOGT, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 5, 1956

—2224-4

[fol. 1] **IN THE SUPREME COURT OF WISCONSIN**

APPENDIX TO APPELLANTS' BRIEF

This is an appeal from a judgment of the Circuit Court of Waukesha County, Honorable Herbert A. Bunde, presiding, entered on the 9th day of November, 1954, granting a permanent injunction against the defendant-appellants and in favor of plaintiff-respondent.

IN CIRCUIT COURT OF WAUKESHA COUNTY

OPINION—September 15, 1954

It does not appear to have been established by the plaintiffs in either case that the picketing was for an unlawful purpose. True the information being disseminated as a result of the picketing may have caused interference with the business of the plaintiffs, or even loss, but it cannot be said that because of such results the defendants had such intent. It appears without question to this court that the purpose of the picketing was to induce the employees to organize and affiliate with defendant's (sic). If indirectly there were other results it would not be at all surprising but would rather be expected. Unjustly perhaps, there might very well be injury done to other parties than those to the controversy and it might be a possibility for speculation that the reason for the passage of Section 103.535 was to attempt to prevent such injury.

The findings by this court will therefore contain no finding that the picketing was done for an unlawful purpose.

[fol. 2] The question therefore appears to be as to whether or not Section 103.535 is uncons itutional in prohibiting picketing where no labor dispute exists as defined by Wisconsin Statutes; and where the picketing is not for an unlawful purpose.

This court has found that no labor dispute exists in the cases here being considered, as defined by statute.

Constitutionality remains to be determined.

In the Hughes case, referred to in plaintiffs (sic) brief it was stated that picketing is not beyond the control of the State if the manner in which the picketing is conducted

or the purpose it seeks to effectuate gives ground for its disallowance.

It would seem clear as far as this case is authority that there must be something more than simple, peaceful picketing if the picketing is to be enjoined.

The Hanke case can be distinguished from the cases we have here for consideration. There the fact of self employment seems to have been a persuasive factor.

All cases cited recently determined by the U.S. Supreme Court are consistent at least in that they hold that picketing is more than speech. That holding is of course a natural finding as it is common knowledge that picketing is done for other reasons than merely information. It is used for influence, for persuasion and is very likely coercion. [fol. 3] Public policy and the purpose of a legislative program could well be directed to eliminating such acts unless a particular situation defined as a labor dispute existed.

States have a right to determine public policy. The free speech issue as applied to picketing and the rule thereon as stated in the Thornhill case has lost most of its effectiveness by modification thereof in many more recent cases. It probably can be said that it is no longer the law.

This court is mindful of the case of State v. Stehlek, 262 Wis. 642, but irrespective of the good advice given therein, would still hold that the legislature was within its constitutional authority in enacting Section 103.535.

The observations in this opinion are only for the purpose of enlightening counsel in the cases under consideration as to the reasons why this court feels that the injunctions must be continued in force.

Dated September 15, 1954.

By the Court.

Herbert A. Bunde, Circuit Judge.

1 Proof of Service on T. Schneider.

2 Proof of Service on Gilbert Kelly, Vice-President Local 695.

3 Proof of Service on Laborers Union, Local 392—Wife of Leistikow.

[fol. 4] 4-5 Order to Show cause and Temporary Restraining Order.
6 Summons.

IN CIRCUIT COURT OF WAUKESHA COUNTY

COMPLAINT.

Now comes the plaintiff above named, by its attorneys, Lamfrom & Peck, and for and as a cause of action against the above named defendants, alleges and shows to the Court as follows:

1. That the plaintiff now is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

2. That the plaintiff's place of business is located in the Town of Oconomowoc, Waukesha County, State of Wisconsin.

3. That the plaintiff operates in the Town of Oconomowoc, Waukesha County, Wisconsin, a gravel pit, and is engaged in the business of producing and selling washed sand, gravel and ready-mixed concrete, and that said gravel pit and the place of business where it produces and sells washed sand, gravel and ready-mixed concrete is located on a tract of land, approximately 15 acres, more particularly described as follows:

> Part of the Southwest quarter (SW ¼) of Section 36, Township 8 North of Range 17 East, commencing at the Northeast corner of Lot Forty-three, (43), State Road Addition, thence to pond; thence Northwest along [fol. 5] said pond to the Southwest corner of Bach's and land; thence North 47° West 295 feet; thence South west 630 feet; thence South 45° West 82.5 feet to the Northwest corner of Lot 25 of said plat; thence 936.5 feet to the place of beginning.

4. That said tract of land borders onto a public road, generally known as Town Road P, and that a private driveway leads from within said tract of land towards and intersects with said Town Road P.

5. The defendant, International Brotherhood of Teamsters, Local 695, AFL, is a labor union having offices and

agents located at 117½ Main Street, City of Watertown, Dodge County, State of Wisconsin; that the defendant, International Union of Operating Engineers, Local 139, AFL, is a labor union having offices and agents located at 1029 West Wells Street, City of Milwaukee, State of Wisconsin; and that the defendant, Building & Construction Laborers Union, Local 392, AFL, is a labor union having offices and agents located at 141 Randolph Street, City of Waukesha, Waukesha County, State of Wisconsin.

6. That the plaintiff's investment in equipment and property is in excess of $150,000.00; and that the plaintiff's gross annual business amounts to approximately $300,000.00.

7. That the plaintiff, in the past, has been receiving daily, on working days, cement in bulk from the Universal Atlas Cement Company, Milwaukee, Wisconsin, which cement [fol. 6] has heretofore been delivered by trucks of Schwerman Trucking Company, Milwaukee, Wisconsin; that the plaintiff has been receiving heretofore steel products from the Joseph T. Ryerson & Son, Inc., Milwaukee, Wisconsin, which steel products have heretofore been delivered to plaintiff's place of business by trucks of the Olson Motor Service, Inc., of Milwaukee, Wisconsin; and that the plaintiff heretofore has been receiving miscellaneous material and supplies, such as paint, tools, lubricants, bolts, cables, etc., which supplies have heretofore been delivered to plaintiff by trucks of the Motor Transport Company, Milwaukee, Wisconsin.

8. That beginning on or about July 13, 1954, and continuously through said day and every day thereafter, to the date of the verification of this complaint, the defendants have caused the plaintiff's place of business aforesaid to be picketed by various individuals walking up and down upon said Town Road P, in front of the plaintiff's private right of way entrance; that said individuals carried and are carrying large signs which are inscribed as follows:

"The men on this job are not 100% affiliated with the A. F. L.
Building & Construction Laborers Union, Local 392.
Operating Engineers Union, Local 139.
Teamsters Union, Local 695."

9. That since the commencement of said picketing of plaintiff's premises, a driver of the Schwerman Trucking Com-
[fol. 7] pany, intending to deliver cement in bulk, turned away because of said pickets, and the plaintiff, since that time, has been compelled to haul its cement with its own trucks, in bags rather than in bulk, which procedure is more laborious, inefficient, time consuming, and much more expensive, to the damage of the plaintiff.

10. That since the commencement of said picketing of plaintiff's premises, truck drivers of the Motor Transport Company, intending to deliver goods to the plaintiff, turned back three or four times, and more particularly, on or about July 15th and 16th, 1954, and have not since delivered the goods destined for plaintiff.

11. That since the commencement of said picketing of plaintiff's premises, truck drivers of the Olson Motor Service, Inc., have refused to deliver steel products destined for the plaintiff from the Joseph T. Ryerson & Son, Inc.

12. That as a consequence of the several trucking companies' drivers refusing to deliver loads to the plaintiff, the plaintiff, with its own trucks had to haul the goods and supplies heretofore delivered by said trucking companies, resulting in great inconvenience, inefficiency, extra labor and expense, and much damage.

13. That the plaintiff employs approximately 15 to 20 men in its plant and as truck drivers, and that, on information and belief, many of these employees have been contacted by agents of the defendants for the purpose of inducing said employees to join one or more of defendant labor organiza-
[fol. 8] tions, and that, on information and belief, none of the plaintiff's employees have joined any of defendant labor organizations; and have indicated to defendant unions' agents that they did not desire to join any of said labor organizations, and, on information and belief, that plaintiff's employees continue to refuse to become members of any of defendant labor organizations.

14. That the picketing of plaintiff's premises has been and is being engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plain-

tiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization.

15. That there is no labor dispute of any kind in existence between the plaintiff and any of its employees, and the picketing of plaintiff's premises by the defendants is not because, or by virtue of any labor dispute involving the plaintiff, or any of its employees, and said picketing is in direct violation of the provisions of Section 103.535 of the Wisconsin Statutes (1953), and in addition constitutes a violation of Section 111.06 (2) (b) of the Wisconsin Statutes (1953).

16. That the plaintiff is not engaged in a business involving interstate commerce, and that the plaintiff's business does not affect interstate commerce, in that:

(a) Nearly all of the sand, gravel, ready-mixed ce-
[fol. 9] ment produced by the plaintiff is sold and delivered locally in Waukesha, Jefferson, Dodge and Washington Counties, State of Wisconsin, and none of said gravel, sand, and ready-mixed concrete is sold and/or delivered outside of the State of Wisconsin;

(b) None of said sand, gravel and ready-mixed concrete is destined for ultimate out-of-state shipment, and said materials do not in fact reach localities outside of the State of Wisconsin;

(c) Only an insignificant amount of plaintiff's sales, to-wit, less than $2,000.00 per year, of the material produced and sold by plaintiff are furnished to firms or individuals engaged in interstate commerce, and that none of such material ultimately goes outside the State of Wisconsin;

(d) Plaintiff does not receive materials and supplies directly from outside the State of Wisconsin; and

(e) Plaintiff does not furnish materials and supplies to establishments directly affecting the National Defense.

17. That the plaintiff is suffering irreparable damage, and has no adequate remedy at law, and that plaintiff will continue to suffer irreparable damage unless defendants are immediately enjoined and restrained from engaging in and

from continuing to engage in the illegal acts heretofore complained of.

Wherefore, Plaintiff demands judgment that the defend- [fol. 10] ants, and each of them, their employees, servants, agents, confederates, associates, and all of the officers and members of said defendant labor organizations, during the pendency of this action, and thereafter, be perpetually enjoined and restrained:

(a) From directly or indirectly establishing and maintaining, or causing to be established or maintained, any pickets or patrols in front of plaintiff's entrance ways, driveways, on private and public roads leading to plaintiff's business establishment, and generally at or near plaintiff's establishment located in the Town of Oconomowoc, Waukesha County, State of Wisconsin;

(b) From displaying or causing to be displayed any signs or placards anywhere at or near plaintiff's business establishment or on the roads and highways leading thereto;

(c) From inducing or persuading, or causing others to induce or persuade trucking, cartage, and other transportation companies and their officers, agents and employees to decline to deliver, haul or transport goods and supplies to and from the plaintiff's business establishment;

and that the plaintiff have such other and further relief as to the Court may seem just and equitable.

Lamfrom & Peck, Attorneys for Plaintiff. Hilbert W. Dahms, Of Counsel.

Verification by Frederick Vogt.

[fol. 11] IN THE CIRCUIT COURT OF WAUKESHA COUNTY

AFFIDAVIT OF FRED OXENDORF

STATE OF WISCONSIN,
Waukesha County, ss.

Fred Oxendorf, being first duly sworn, on oath, deposes and says that since 1946 he has been and still is an employee of the plaintiff, Vogt, Inc., operating for such employer a ready-mixed concrete truck and, generally, delivering concrete and cement.

That he is 41 years of age, married, and resides at 1274 Lake Drive, Town of Okauchee, Waukesha County, Wisconsin.

That on or about the first week of April, 1954, he delivered a truck load of ready-mixed concrete to the Self Service Laundry, in the Village of Hartland, Waukesha County, Wisconsin; that at that time he was approached by two men who revealed themselves as agents for the Teamsters Union, and that he was asked about joining the union, and his membership in said union was solicited; and that to all of this he replied to said union agents that he was satisfied about his present state of employment, that he did not even think about a union, and, generally, indicated that he did not desire to join the union.

Fred Oxendorf.

Subscribed and sworn to before me this 28th day of July, 1954.

Hilbert W. Dahms, Notary Public, Waukesha Co., Wis.

My commission expires: Aug. 29, 1954.

[fol. 12] IN THE CIRCUIT COURT OF WAUKESHA COUNTY

AFFIDAVIT OF LEE LINSE

STATE OF WISCONSIN,
Waukesha County, ss.

Lee Linse, being first duly sworn, on oath deposes and says that he is now, and for the past two years has been, an

employee of the plaintiff, Vogt, Inc., engaged in operating a ready-mixed concrete truck for said employer.

That he is 21 years of age, married and resides in the Town of Sullivan, Jefferson County, State of Wisconsin.

That in the Fall of 1953, while parking in the center of the main street of the Town of Delafield, Waukesha County, State of Wisconsin, near the monument, his truck having broken down, he was approached by two or three men who identified themselves as agents of the Teamsters Union, and that they questioned him as to why he did not join the Teamsters Union, to which question he replied that he was satisfied with his present working conditions.

That he has since said time been followed several times while operating one of plaintiff's ready-mixed concrete trucks on the public highways, by individuals who appeared to be agents or organizers of the Teamsters Union, and that one such occasion was when he recently drove to the [fol. 13] Town of Greenbush.

Lee Linse.

Subscribed and sworn to before me this 28th day of July, 1954.

Hilbert W. Dahms, Notary Public, Waukesha Co., Wis.

My comm. expires: Aug. 29, 1954.

IN THE CIRCUIT COURT OF WAUKESHA COUNTY

AFFIDAVIT OF GEORGE BRANDT

STATE OF WISCONSIN,
Waukesha County, ss.

George Brandt, being first duly sworn, on oath, deposes and says that for several years past, and since 1951, he has been an employee of the plaintiff, Vogt, Inc.; that he is 31 years of age, and that he resides in the Town of Concord, Jefferson County, State of Wisconsin, and that his post office address is Route No. 1, Helenville, Wisconsin.

That while in the employ of the plaintiff, and while operating a ready-mixed concrete truck, he was, at three sep-

arate times followed by agents of the defendant Teamsters Union, which agents followed him to a point at or near the place to which his load of ready-mixed cement was to be delivered.

That on or about April 5, 1954, he was followed by an agent of said Teamsters Union from the City of Oconomo-[fol. 14] woc, Wisconsin, to a point at or near the sub-station of the Wisconsin Electric Power Company located in the Town of Ixonia, Jefferson County, State of Wisconsin, at which point said union agent accosted him and spoke to him as hereinafter indicated; and that on or about August 10, 1953, he was stopped on the highway while returning from a ready-mixed concrete delivery made to the farm of Francis J. Trecker, located on the West Shore of Pine Lake, Waukesha County, Wisconsin, and was there, too, talked to by the agents of the Teamsters' Union said agents ter indicated.

That on the occasions when he was thus accosted and talked to by the agents of the Teamsters' Union, said agents attempted to solicit him for membership in the Union, and told him of the alleged advantages of joining such union, and inquired as to the wages, hours and working conditions at plaintiff's place of business, to all of which affiant replied that he did not want to join the union, and that he was happy in his present state of employment.

That said union agents indicated they represented a local of the Truck Drivers' Union from Waukesha.

George Brandt.

Subscribed and sworn to before me this 28th day of July, 1954.

Hilbert W. Dahms, Notary Public, Waukesha County, Wisconsin.

(N.S.)

My Commission Expires Aug. 29, 1954.

[fol. 15] IN THE CIRCUIT COURT OF WAUKESHA COUNTY

AFFIDAVIT OF EARL EPPLER

STATE OF WISCONSIN,
Waukesha County, ss.

Earl Eppler, being first duly sworn, on oath deposes and says that since May 1, 1953, he has been an employee of the plaintiff, Vogt, Inc.; that he is 24 years of age and that he resides in the Town of Ixonia, Jefferson County, State of Wisconsin, and that his post office address is Route No. 3, Oconomowoc, Wisconsin.

That on or about April 1, 1954, while in the employ of the plaintiff, and while operating a truck and making delivery of a load of sand on Roland Street in the City of Oconomowoc, Waukesha County, Wisconsin, he was accosted by a labor union representative who showed affiant his card and wanted to know what affiant thought of joining a union; he also questioned affiant concerning his wages and working conditions; pointing out alleged benefits and advantages of union membership, and representing that employees of other general contractors in the vicinity of Oconomowoc employed union labor; that affiant replied that he didn't care whether Vogt, Inc, was union or not and that he was satisfied with his employment conditions.

Earl D. Eppler.

Subscribed and sworn to before me this 28th day of July, 1954.

(N. S.), Hilbert W. Dalhms, Notary Public, Waukesha County, Wisconsin.

My Commission Expires Aug. 29, 1954.

[fol. 16] 17 Cover.
18 Affidavit of Prejudice.
19 Cover.
20 Order of Appointment.

IN CIRCUIT COURT OF WAUKESHA COUNTY

ANSWER

Now come the above named defendants, International Brotherhood of Teamsters, Local 695, AFL; International Union of Operating Engineers, Local 139, AFL; and Building & Construction Laborers Union, Local 392, AFL, by their attorneys, and for an answer to the complaint of the plaintiff admit, deny, qualify, and allege as follows:

1. Admit the allegations of paragraph 1, 2, 3, 4, and 5 of said complaint.

2. Deny any knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 6 of said complaint, and put plaintiff to its proof.

3. Deny any knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 7 of the complaint, and put plaintiff to its proof.

4. Admit the allegations of paragraph 8.

5. Deny any knowledge or information sufficient to form [fol. 17] a belief as to the allegations set forth in paragraphs 9, 10 and 11, and put plaintiff to its proof.

6. Deny any knowledge or information sufficient to form a belief as to the allegations of paragraph 12.

7. Admit so much of the allegations of paragraph 13 alleged that agents of the defendants have contacted plaintiff's employees and that none of plaintiff's employees have joined any of the defendant labor organizations; but deny any knowledge or information sufficient to form a belief as to the desires of the plaintiff's employees to join any of said labor organizations.

8. Deny that the picketing of plaintiff's premises has been, or is being engaged in, for the purpose of coercing, intimidating and inducing the employer to force, compel or induce its employees to become members of defendant labor organizations; further deny that the picketing of plaintiff's premises has been, or is being engaged in, for the purpose of injuring the plaintiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization.

9. Deny that there is no labor dispute between the defendants and the plaintiff's employees; further deny that the

picketing herein is in any way in violation of the provisions of Section 103.535 of the Wisconsin Statutes; further deny that said picketing constitutes a violation of Section 111.06 (2) (b) of the Wisconsin Statutes.

10. Deny any knowledge or information sufficient to form [fol. 18] a belief as to the allegations set forth in paragraph 16 of the complaint, and put plaintiff to its proof.

11. Deny that the plaintiff is suffering irreparable damage or that plaintiff has no adequate remedy at law or that plaintiff will continue to suffer irreparable damage unless defendants are immediately enjoined and restrained from engaging in or from continuing to picket.

In Circuit Court of Waukesha County

Affirmative Defenses

1. As and for an affirmative defense, defendants allege that the plaintiff hires employees who work at crafts represented by defendant unions, and that none of these employees are members of the defendant unions, or any union affiliated with the American Federation of Labor, and further allege on information and belief that plaintiff's employees work under wages, hours and working conditions which are inferior to those of the aforesaid craft union, and the performance of work under such conditions has an adverse effect upon the working conditions of the aforesaid craft unions; and that there exists a labor dispute between the defendant unions and all persons working at said crafts in any capacity who are not members of the defendant unions or of any union affiliated with the American Federation of Labor, and who work under conditions which are different from and inferior to those enjoyed by the members of such craft unions.

That even though plaintiff's employees may be working presently under conditions which are equivalent to the conditions under which members of the aforesaid craft [fol. 19] unions work, there, nevertheless, exists a labor dispute between such plaintiff's employees and the defendant unions in that although plaintiff's employees may be presently employed under comparable working condi-

ditions, defendant unions have no assurance that such equivalent working conditions will continue in the future, and the only recourse open to the defendant union to assure the continuance of such conditions is that they induce all employees working at the aforesaid crafts to become members of such craft unions or any other union affiliated with the American Federation of Labor.

That these answering defendants further allege that any and all activities engaged in by the defendants are for a lawful purpose and carried on by lawful means; that said activities are protected under the First and Fourteenth Amendments to the United States Constitution, and similar provisions of the Constitution of the State of Wisconsin, in that said activities constitute an exercise of freedom of speech and of the press, and that if these defendants are restrained from engaging in said activities, such restraint will be in violation of said constitutional provisions, and for the further reason that said restraint would deprive the defendants of privileges and immunities of citizens of the United States, and would deprive them of life, liberty, and property without due process of law and would deprive them of the equal protection of the laws; defendants further allege that if the Statutes of the State of Wisconsin are construed to apply to the activities of the defendants herein so as to prohibit said activities, then said Sections of the Wisconsin Statutes are unconstitutional in that they violate [fol. 20] the First and Fourteenth Amendments to the United States Constitution and similar provisions of the Wisconsin Constitution.

2. As and for a further affirmative defense, these defendants allege that this court does not have jurisdiction over the subject matter or the parties to this action pursuant to Sections 103.56 and 133.07 of the Wisconsin Statutes, in that the controversy set forth in the complaint is one which grows out of and arises out of a labor dispute as defined in Section 103.62.

3. As and for a further affirmative defense, defendants allege that plaintiff has an adequate remedy at law pursuant to Chapter 111 of the Wisconsin Statutes, jurisdiction over which is vested in the Wisconsin Employment Relations Board.

4. As and for a further affirmative defense, defendants allege that the activities in which they are engaged are protected under Section 103.53 of the Wisconsin Statutes.

Wherefore, these answering defendants pray for judgment dismissing the plaintiff's complaint, together with the costs and disbursements of this action, and for such other relief as under the circumstances may be deemed just and equitable.

Padway, Goldberg & Previant, Attorneys for Defendants, International Brotherhood of Teamsters, Local 695, AFL; International Union of Operating Engineers, Local 139, AFL, and Building and Construction Laborers Union, Local 392, AFL.

[fol. 21] 26. Verification by Alois S. Mueller.
27. Verification by Milton MacDonald.
28. Cover.
34–35. Plaintiff's Injunction Bond.
36. Verification of Hilbert W. Dahms.
37. Insurance Form.
38. Cover.

In Circuit Court of Waukesha County

Findings of Fact and Conclusions of Law—November 9, 1954

The order to show cause of the plaintiff why a temporary injunction should not be issued as prayed for in the complaint, having come before the above Court on the 19th day of August, 1954, at the regular February Term of this Court, before the Honorable Herbert A. Bunde, Circuit Judge, Lamfrom & Peck appearing as attorneys for the plaintiff, and Hilbert W. Dahms of counsel, and all of the defendants appearing by Padway, Goldberg & Previant, by Albert J. Goldberg and David L. Uelmen, and after considering the allegations in the compla-nt and the affidavits attached thereto, and the allegations in the answer, and after hearing the arguments and considering the briefs of counsel, and being sufficiently advised in the premises, I

hereby make and file the following Findings of Fact and Conclusions of Law, to-wit:

[fol. 22] Findings of Fact

1. That the facts as alleged in paragraphs 1, 2, 3, 4, 5 and 8 of the complaint, admitted in the defendants' answer, are true and correct, and that picketing referred to in paragraph 8 of the complaint continued up to the time the temporary restraining order, issued by the Honorable Allen D. Young, Judge of the Circuit Court of Waukesha County on the 29th day of July, 1954, was served upon the defendants.

2. That the drivers of several trucking companies have refused to deliver and haul goods and materials to and from plaintiff's premises as a result and in consequence of defendants' picketing of the plaintiff's premises, resulting in great inefficiency, inconvenience, extra labor and expense, and much damage to plaintiff.

3. That the facts as alleged in paragraph 13 of the complaint, admitted in paragraph 7 of the defendants' answer, are true and correct, and, further, that plaintiff's employees do not desire to join defendant labor organizations and continue to refuse to become members of such labor organizations.

4. That the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's (sic).

5. That no labor dispute or controversy has been or is in existence between the plaintiff and any of its employees, or between the plaintiff and the defendants, concerning the [fol. 23] right or process or details of collective bargaining, or concerning the designation of bargaining representatives, and that the picketing of the plaintiff's premises by the defendants was not undertaken because of any such labor dispute or controversy, as defined in Sec. 103.62 (3), Wis. Stats.

[fol. 23] 6. That the facts as alleged in paragraph 16 of the Complaint are true and correct.

And I find as

Conclusions of Law

1. That there was and is no labor dispute in existence between the plaintiff and its employees, or between the plaintiff and the defendants.

2. That Sec. 103.535, Wis. Stats., is controlling since no labor dispute exists, as that term is defined in Sec. 103.62(3), Wis. Stats., and that the defendants' conduct was and is unlawful by reason of Sec. 103.535, Wis. Stats.

3. That Sec. 103.535, Wis. Stats., is a valid and constitutional enactment and does not violate the First and Fourteenth Amendments to the Constitution of the United States, and the similar provisions of the Constitution of Wisconsin, and is a valid exercise of the police power of the State of Wisconsin.

4. That this Court does have jurisdiction over the subject matter and the parties and that this case is not one involving or growing out of a labor dispute, as defined in Sec. 103.62 (3), Wis. Stats.

[fol. 24] 5. That the plaintiff has suffered, and continuation of defendants' conduct would further cause it to suffer, irreparable damage; and that the plaintiff has no adequate remedy at law.

6. That the plaintiff is not engaged in a business involving or affecting interstate commerce.

7. That the named defendants, and each of them, their employees, servants, agents, confederates, associates, and all of the officers and members of said defendant labor organizations, during the pendency of this action, and thereafter, be enjoined and restrained:

8. That the named defendants, and each of them, their employees, servants, agents, agents, confederates, associates, and all of the officers and members of said defendant labor organizations, during the pendency of this action, and thereafter be enjoined and restrained:

(a) From directly or indirectly establishing and maintaining, or causing to be established or maintained, any pickets or patrols in front of plaintiff's entrance ways, driveways, on private and public roads leading to plaintiff's business establishment, and generally at or near plaintiff's establishment located in the Town of Oconomowoc, Waukesha County, State of Wisconsin.

(b) From displaying or causing to be displayed, anywhere at or near plaintiff's business establishment or on the roads and highways leading thereto, any signs [fol.25] or placards bearing the legend or legends as described in the Complaint herein, or stating or intending to cause to be understood that there is a labor dispute in existence between the plaintiff and its employees, or between the plaintiff and any of the defendants.

(c) From inducing or persuading, or causing others to induce or persuade trucking, cartage and other transportation companies and their officers, agents and employees to decline to deliver, haul or transport goods and supplies to and from the plaintiff's business establishment.

Let an order be entered and a temporary injunction, as demanded in the Order to Show Cause, except as otherwise provided in the Findings of Fact and Conclusions of Law herein, issue accordingly.

Dated at Wisconsin Rapids, Wisconsin, this 9th day of November, 1954.

By the Court: (S.) Herbert A. Bunde, Circuit Judge.

[fol.26] In Circuit Court of Waukesha County

Judgment and Order for Permanent Injunction—

November 9, 1954

On reading the verified complaint of the plaintiff and the affidavits attached thereto in support of the motion, and the verified answer of the defendants in opposition thereto; and after hearing the arguments of counsel, Lamfrom & Peck, attorneys, and Hilbert W. Dahms, of counsel, for the plaintiff, and Padway, Goldberg & Previant, by Albert J. Goldberg and David L. Uelman, attorneys for the defendants, respectively, in support of and in opposition to the motion; and after considering the briefs of counsel, this Court having thereupon issued its decision on September 15, 1954; and after having made and filed its Findings of

Fact and Conclusions of Law, from which it satisfactorily appears, and wherein the Court finds, that the plaintiff is entitled to the relief prayed for, viz., an order and injunction as hereinafter set forth; and the plaintiff having heretofore given an undertaking in the sum of Five Hundred Dollars ($500.00), which has been duly approved; and upon stipulation by and between the parties, hereto annexed;

It Is Hereby Ordered and Adjudged that the above named defendants, and each of them, their employees, servants, agents, confederates, associates, and all of the officers and members of said defendant labor organizations, be perpetually enjoined and restrained:

(a) From directly or indirectly establishing and maintaining, or causing to be established or main- [fol. 27] tained, any pickets or patrols in front of plaintiff's entrance ways, driveways, on private and public roads leading to plaintiffs' business establishment, and generally at or near plaintiff's establishment located in the Town of Oconomowoc, Waukesha County, State of Wisconsin.

(b) From displaying or causing to be displayed, anywhere at or near plaintiff's business establishment or on the roads and highways leading thereto, any signs or placards bearing the legend or legends as described in the complaint herein, or stating or intending to cause to be understood that there is a labor dispute in existence between the plaintiff and its employees, or between the plaintiff and any of the defendants.

(c) From inducing or persuading, or causing others to induce or persuade, trucking, cartage and other transportation companies and their officers, agents and employees to decline to deliver, haul or transport goods and supplies to and from the plaintiff's business establishment.

And, It Is Hereby Further Ordered that the undertaking heretofore given by the plaintiff be and the same is hereby cancelled and discharged.

Dated this 9th day of November, 1954, at Wisconsin Rapids, Wisconsin.

By the Court, (S.) Herbert A. Bunde, Circuit Judge.

[fol. 28] In Circuit Court of Waukesha County

Stipulation of Settled Record—November 8, 1954

It Is Hereby Stipulated and Agreed by and between the plaintiff and the defendants in the above entitled action, through their respective attorneys, that, inasmuch as the record herein contains all of the facts and evidence that would be adduced upon a trial on the merits of the issues herein, the Court may consider such record as the record upon which the Court may enter such order and final judgment as the Court may deem proper.

Dated: November 8th, 1954.

Lamfrom & Peck, by J. A. Bernheim, (S) Attorneys for Plaintiff. Padway, Goldberg & Previant, by Albert J. Goldberg, (S.) Attorneys for Defendants.

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48 Admission of Service.
50 Notice of Entry of Judgment.

[fol. 29] In Circuit Court of Waukesha County

Notice of Appeal—December 10, 1954

To Lamfrom and Peck,
Attorneys for Plaintiff,

Samuel D. Connell,
Clerk of the Circuit Court
for Waukesha County.

Please Take Notice that the defendants above named hereby appeal to the Supreme Court of the State of Wisconsin from the Judgment entered by the above named Court herein, entered on the 19th day of November, 1954, in favor of the plaintiff and against the defendants, and from the whole thereof.

Dated at Milwaukee, Wisconsin, this 10th day of December, 1954.

Padway, Goldberg & Previant, Attorneys for Defendants.

53 Appeal Bond.

[fol. 30] Argument and submission—May 31, 1955 (omitted in printing).

[fol. 31] IN SUPREME COURT OF WISCONSIN

Waukesha Circuit Court

VOGT, Incorporated, a Wisconsin corporation, Respondent

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, AFL, International Union of Operating Engineers, Local 139, AFL, and Building & Construction Laborers Union, Local 392, AFL., Appellants

JUDGMENT—June 28, 1955

This cause came on to be heard on appeal from the judgment of the Circuit Court of Waukesha County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Waukesha County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to dissolve the injunction and dismiss the complaint.

[fol. 32] IN SUPREME COURT OF WISCONSIN, AUGUST TERM, 1954

No. 285

VOGT, Incorporated, a Wisconsin corporation, Respondent

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, AFL, International Union of Operating Engineers, Local 139, AF, and Building & Construction Laborers Union, Local 392, AFL., Appellants

OPINION

Appeal from a judgment of the circuit court for Waukesha County, HERBERT A. BUNDE, circuit judge. *Reversed and remanded.*

In 1954 plaintiff operated a gravel pit in the town of Oconomowoc, Waukesha County. It was engaged in the business of producing and selling washed sand and gravel and ready-mixed concrete. For the operation of its business it received by truck cement, steel products and other materials. On July 13, 1954 the defendant unions stationed pickets at the entrance to plaintiff's property on a town road upon which plaintiff's property abuts. The location was not frequented by the general public. The pickets carried signs reading:

> "The men on this job are not 100% affiliated with the A.F.L.
>
> Building & Construction Laborers Union, Local 392
> Operating Engineers Union, Local 139
> Teamsters Union Local 695"

Because of the picketing some of the truck drivers who had been hauling materials to plaintiff's plant refused to cross the picket line to deliver materials. Plaintiff's em-
[fol. 33] ployees had been solicited to join defendant unions but had refused and had indicated that they did not desire to join. No labor dispute or controversy of any kind ex-

isted. None of the members of the defendant unions were in plaintiff's employ. The trial court found as follows:

> "2. That the drivers of several trucking companies have refused to deliver and haul goods and materials to and from plaintiff's premises as a result and in consequence of defendant's picketing of the plaintiff's premises, resulting in great inefficiency, inconvenience, extra labor and expense, and much damage to plaintiff.
>
> "3. That the facts as alleged in paragraph 13 of the complaint, admitted in paragraph 7 of the defendants' answer, are true and correct, and further, that the plaintiff's employees do not desire to join defendant labor organizations and continue to refuse to become members of such labor organizations.
>
> "4. That the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's (sic).
>
> "5. That no labor dispute or controversy has been or is in existence between the plaintiff and any of its employees, or between the plaintiff and the defendants, concerning the right or process or details of collective bargaining, or concerning the designation of bargaining representatives, and that the picketing of the plaintiff's premises by the defendants was not undertaken because of any such labor dispute or controversy, as defined in Sec. 103.62(3), Wis. Stats."

Upon appropriate conclusions of law judgment was entered on November 9, 1954 permanently restraining defendants from picketing at the premises. Defendants appeal.

[fol. 34] GEHL, J. In a memorandum opinion filed by the trial judge he stated his conclusion that the picketing had not been conducted for an unlawful purpose, but that it constituted a violation of section 103.535 Stats. which provides as follows:

> "Unlawful conduct in labor controversies. It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any

person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employees or their representatives."

Sec. 103.62 Stats. provides:

"* * *

"(3) The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

The question whether picketing as it is described in these statutes, but otherwise lawful, may be enjoined, has not been squarely presented to this court. Counsel for defendants contend that if sec. 103.535 is to be construed as authorizing such action it is invalid as depriving defendants of the right of free speech in violation of the federal and the state constitutions. We have held that if the picketing is conducted in violation of section 111.06(2)(a) or 111.06-(2)(b) Statutes it is done for an unlawful purpose and may be enjoined. *Retail Clerks' Union* v. *Wisconsin E. R. Board*, 242 Wis. 21, 6 N. W. (2d) 698; *Christoffel* v. *Wisconsin E. R. Board*, 243 Wis. 332, 10 N. W. (2d) 197; *Wisconsin E. R. Board* v. *Retail Clerks Int. Union*, 264 Wis. [fol. 35] 189, 58 N. W. (2d) 655. The United States Supreme Court has also recognized that picketing if conducted for an unlawful purpose may be prohibited by state statute. *Building Service Union* v. *Gazzam*, 339 U. S. 532.

Sec. 111.06(2) provides that it shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his

domicile, or injure the person or property of such employe or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative."

Counsel for plaintiff contend that the picketing was conducted in violation of these provisions and therefore for an unlawful purpose. The trial judge did not find facts which would have supported a conclusion that either subdivision had been violated; he went no further than to find "that the purpose of the picketing was to induce the employees to organize and affiliate with defendant's", (sic) and rejected a finding requested by the plaintiff as follows:

"4. That the picketing of plaintiff's premises has been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plaintiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization."

The testimony would not have supported a finding of the facts constituting a violation of either of the subsections. No threats were made against the plaintiff; no demands were made upon it. It does not appear that any of the defendants' representatives had even spoken to plaintiff's officers about their desire to organize its employees. There was no violence, no force and no threat of force, no disorder or physical obstruction to plaintiff's property. There was no evidence that defendants' representatives [fol. 36] had coerced or intimidated any of plaintiff's employees in their right to join or refuse to join either of defendant unions. There was only peaceful persuasion exercised by the carrying of a banner bearing a truthful legend.

Having concluded that the picketing was not conducted

for an unlawful purpose we reach the question as it was stated in *American Federation of Labor* v. *Swing*, 312 U. S. 321, 85 L. Ed. 855:

> "Is the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?"

The question was answered by the court in the affirmative. In that case the union had unsuccessfully tried to unionize Swing's beauty parlor. Picketing followed. Suit was brought by Swing and his employees to enjoin the interference with the former's business. The United States Supreme Court considered that a permanent injunction granted by the state court rested on the lafter's conclusion that there had been no more than "peaceful persuasion". The court said:

> "We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> "Such a ban of free communication is inconsistent with the guaranty of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become

[fol. 37] a commonplace. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 ALR 360. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

The ruling in the *Swing* Case was followed in *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769 and *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, and recognized by this court as being binding on us in *Wis. E. R. Board* v. *International Asso., etc.*, 241 Wis. 286, 6 N. W. (2d) 339.

These cases must be accepted as stating the settled law that a state may not constitutionally prohibit the exercise of free speech by picketing by narrowing the field of a labor dispute to include only the relationship between an employer and his employees.

Four decisions of the United States Supreme Court are cited by plaintiff as authority for its assertion that the doctrine of the *Swing* and *Wohl* cases has been limited by that court:

Giboney v. *Empire Storage & Ice Co.*, 336 U. S. 490;
Hughes v. *Superior Court*, 339 U. S. 460;
Building Service Employees v. *Gazzam*, 339 U. S. 532;
International Brotherhood of Teamsters v. *Ranke*, 339 U. S. 470;
Local Union No. 10 v. *Graham*, 345 U. S. 192."

We do not so construe them. In each of them the right of the state to enjoin picketing under the circumstances existing was recognized. They, as well as others resulting in similar holdings, have been examined by us. It would serve no useful purpose to discuss each of them and to point out in what respect it is to be distinguished in its facts from those appearing in the instant case. It is enough to say that in each of them there were circumstances which the court said demonstrated a purpose on the part of the pickets to accomplish an unlawful purpose, in most of them [fol. 38] more than a mere effort peacefully to persuade the employees by the use of a banner to join the interested union.

By the Court: Judgment reversed, and cause remanded with directions to dissolve the injunction and dismiss the complaint.

[fols. 39-40] In Supreme Court of Wisconsin

[Title omitted]

Motion for Rehearing—Filed July 18, 1955

And now comes the Respondent, and moved that the Court grant a rehearing, upon argument to be set forth in a brief which will be served and filed pursuant to the rules of this Court, on the Decision and Judgment of this Court entered and filed on the 28th day of June, 1955, reversing the Judgment of the Circuit Court for Waukesha County.

Dated this 15th day of July, 1955.

Lamfrom & Peck, Attorneys for Respondent.

Leon B. Lamfrom, Jacob L. Bernheim, Hilbert W. Dahms, of Oconomowoc, Wis., of Counsel.

[File endorsement omitted.]

[fol. 41] In Supreme Court of Wisconsin

[Title omitted]

Order Retaining Record—July 18, 1955

The said respondent having moved for a rehearing in this cause, it is now here ordered that the record be retained in this Court until the final determination of said motion.

[fol. 42] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER GRANTING MOTION FOR REHEARING ON QUESTIONS SUBMITTED—October 5, 1955

The Court being now sufficiently advised of and concerning the motion of the said respondent for a rehearing in this cause, it is now here ordered that said motion for rehearing, be, and the same is hereby, granted. Cause to be reargued on questions submitted, on the December assignment, as follows:

(1) Would the facts disclosed by the record and the permissible inferences support a finding that section 111.06(2)(b) has been violated, and

(2) If the answer to the above is in the affirmative may this court, in view of what is found in the Maine case make the finding?

[fol. 43] Reargument and submission—January 12, 1956 (omitted in printing).

[fol. 44] IN SUPREME COURT OF WISCONSIN

VOGT, INCORPORATED, a Wisconsin Corporation, Respondent

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695 AFL, International Union of Operating Engineers, Local 139, AFL, and Building & Construction Laborers Union, Local 392, AFL, Appellants

JUDGMENT—February 7, 1956

This cause came on to be heard on the reargument heretofore ordered herein and was reargued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the original mandate filed herein on

June 28th, 1955, be, and the same is hereby, vacated, and a mandate substituted affirming the judgment of the Circuit Court of Waukesha County.

Justice Currie dissents.

[fol. 45] In Supreme Court of Wisconsin—August Term, 1954

No. 285

Vogt, Inc., a Wisconsin Corporation, Respondent,

vs.

International Brotherhood of Teamsters, Local 695, AFL; International Union of Operating Engineers, Local 139, A. F. L.; and Building and Construction Laborers Union Local 392, A. F. L., Appellants

Opinion

Gehl, J. (On motion for rehearing).

We have concluded that we were in error in our original determination of the issues in this case, and, therefore, withdraw the opinion and the mandate previously entered. We are convinced that in our study of the issues presented we gave too little consideration to the fact that there are limitations upon the right of free speech, and that the prohibition of action against free speech is not intended to give immunity for every use or abuse of language. We gave insufficient notice to the fact that free speech is not the only right secured by our fundamental law, and that it must be weighed, here for instance, against the equally important right to engage in a legitimate business free from dictation [fol. 46] by an outside group, and the right to protection against unlawful conduct which will or may result in the destruction of a business; that both the right to labor and the right to carry on business are liberty and property. We left out of calculation the rule that the court is to consider not only the established facts as they appear in the record, but that it should also give attention to the inferences reasonably and justifiably to be drawn therefrom.

In considering the right of freedom of speech it must be recognized that that right is to be evaluated with the right of the many who have no interest whatever in the relationships between the defendant unions and those whom they seek to acquire as members; that by its very nature every right is related to a duty to exercise it so as to cause a minimum of harm to another, least of all to an innocent bystander; that the right may not be considered apart from that of society to maintain order; and that one who seeks freedom may not wholly ignore his neighbor's right to it.

> "The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.'" *Teamsters Union v. Hanke* (1950), 339 U. S. 470, 474.

We have not found that the United States Supreme Court has ever held that the right of free speech is absolute and to be protected regardless of the effect its exercise may have upon other rights protected by the Constitution. We find no cases decided by that court in which it has been held that a state is without power to curtail the right when, in the exercise of its authority to establish and declare its public policy, it determines that such curtailment is neces- [fol. 47] sary to protect the public interest and property rights. On the contrary, the court has said that:

> ". . . since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity." *Building Service Union v. Gazzam* (9150), 339 U. S. 532, 537.

In *Bakery Drivers Local v. Wohl* (1942), 315 U. S. 769, the court said:

> "A state is not required to tolerate in all places . . . even peaceful picketing by an individual."

And in a concurring opinion Mr. Justice Douglas said:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

In *Giboney v. Empire Storage Co.* (1949), 336 U. S. 490, 502, the court, after calling attention to the importance to our society of a vigilant protection of freedom of speech, said:

> "But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. Virginia Electric Co. v. Board, 319 U. S. 533, 539; Thomas v. Collins, 323 U. S. 516, 536, 537, 538, 539-540. Nor can we say that the publication here should not have been restrained because of the possiblity of separating the picketing conduct into illegal and legal parts. Thomas v. Collins, supra, at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. [fol. 48] But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. See e. g. Fox v. Washington, 236 U. S. 273, 277; Chaplinsky v. New Hampshire, 315 U. S. 568. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade

as well as many other agreements and conspiracies deemed injurious to society."

"Picketing is not beyon[d] the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance." *Hughes v. Superior Court* (1950), 339 U. S. 460, 465-466."

Consistently with the foregoing, we said in *Retail Clerk's Union v. Wisconsin E. R. Board* (1942), 242 Wis. 21, 37, 6 N. W. 698 that :

"Peaceful picketing is now recognized as an exercise of the right of free speech and therefore lawful. (Citing cases) However, it cannot be made the cover for concerted action against an employer in order to achieve an unlawful or prohibited object, such as to compel an employer to coerce his employees to join a union."

There is nothing in *American Federation of Labor v. Swing*, 312 U. S. 321, to support the proposition that freedom of speech includes the right by picketing to induce an employer or an employee to violate the provisions of the Wisconsin statutes, to which we shall later refer, and thus engage in an unfair labor practice and set at naught the declared public policy of the state. No statutory violation was involved in the *Swing* case. The issue was whether "the constitutional guaranty of freedom of discussion [was] infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute." All that was decided in that case was that such [fol. 49] a policy does abridge the exercise of freedom of speech by peaceful picketing. The case is distinguishable from the instant case in that it did not appear in that case that the picketing was in violation of any valid statute or that it was for an unlawful purpose. See discussion of the *Swing* case in *Wisconsin E. R. Board v. Milk, etc., Union* (1941), 238 Wis. 379, 299 N. W. 31.

By enactment of sec. 111.06 (2), Stats., the legislature has declared it to be an unfair labor practice and a viola-

tion of the public policy of this state for an employee individually or in consort with others:

> "(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.
>
> "(b) To coerce, intimidate, or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative."

Sec. 111.04, Stats., provides that:

> "Employees shall have the right of self-organization and the right to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

By the provisions of subsection (3) of the statute it is made an unfair labor practice for *any person* to do any act so prohibited.

The United States Supreme Court has conceded to the states the right to prohibit the conduct defined in these statutes. In *Building Service Union v. Gazzam; supra*, the [fol. 50] court recognized the right of the State of Washington to declare its public policy on the subject and said:

> "The State of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes. The pertinent part of this statute is set forth in the margin. The meaning and effect of this declaration of policy is found in its application by the highest court of the State to the concrete facts of the instant case. Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference,

> or restraint of employers of labor in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgement by the Fourteenth Amendment."
>
> (The statute referred to is similar to our sec. 111.06 (2) (b)).

The question then arises whether the defendants violated sec. 111.06(2)(m) Stats., and thereby engaged in picketing for an unlawful purpose. The trial court refused to find, as plaintiff requested:

> "That the picketing of plaintiff's premises has been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plaintiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization."

We are of the opinion that the finding should have been made. Picketing may be more than free speech. When it is conducted, as it was in this instance, upon a rural highway at the entrance to a gravel pit where an exceedingly small number of possible or probable patrons of the owner's business might pass and be influenced by the Union's ban- [fol. 51] ner, it is more than the mere exercise of the right of free communication. One would be credulous indeed to believe under the circumstances that the Union had no thought of coercing the employer to interfere with its employees in their right to join or refuse to join the defendant Union. We have not the slighest doubt that it was the hope of the Union that the presence of pickets at plaintiff's place of

business would interfere with its operation and deprive it of delivery service, thus bringing pressure upon it to coerce its employees to join the Union.

The message carried upon the Union's banner could not possibly have been intended for the enlightenment of plaintiff's employees who "had been contacted by agents of the defendants for the purpose of inducing [them] to join one or more of defendant's labor organizations, and . . . had indicated to defendant Unions' agents that they did not desire to join any of said labor organizations, and . . . [who at the time of trial] had continued to refuse to become members of any of defendant labor organizations," as was found by the trial court, and which finding is not attacked upon this appeal. Conducted as the picketing was upon a country road and at the scene of the operation of a business which is ordinarily patronized by only a small part of the public, the message carried by the pickets could not have been intended for the guidance of the community. It is clear to us that its only purpose was to influence those who were engaged in transporting supplies and materials to and from plaintiff's place of business and that it was conducted in the hope that these persons would refuse to continue to serve plaintiff and thereby compel it to choose [fol. 52] between two alternatives,—permit the continuance of the picketing and suffer the consequent loss of profits and possibly of its business, or by some means or other to coerce or intimidate plaintiff's employees to join one of the Unions, and thereby violate the provisions of sec. 111.06(2) (b) Stats.

At this point it is important to note that the court made a finding (not attacked upon this appeal):

> "That the drivers of several trucking companies have refused to deliver and haul goods and materials to and from plaintiff's premises as a result and in consequence of defendants' picketing of the plaintiff's premises, resulting in great inefficiency, inconvenience, extra labor and expense, and much damage to plaintiff."

and a conclusion (also not attacked):

> "That the plaintiff has suffered, and continuation of the defendants' conduct would further cause it to suffer,

irreparable damage; and that the plaintiff has no adequate remedy at law."

The inference that the picketing was conducted for an unlawful purpose is inescapable.

We are of the opinion that the court should have made the finding requested by the plaintiff, and that since the facts as to which the request was made are undisputed and the inferences are only one way, we should reverse for error in so refusing. 5 C.J.S. 802. If, however, we may not do that, we are at liberty to and should supply the finding.

In *Pappas* v. *Stacey* 1955), — Mo. —, 116 Atl. (2d), 497, a case in many respects similar to this and regarding which more will be said, the Maine court supplied a similar finding and said that the rule that a trial judge's finding should not be reversed unless it clearly appears that the decision is [fol. 53] erroneous, it is not applicable in a case which involves no oral testimony. The reason for the rule to which the court refers is obvious. The appellate court must give weight to the findings of a trial court made in a contested matter upon oral testimony where the trial judge is in a position to pass on the credibility of the witnesses and the weight to be given to their testimony. He has full opportunity to observe the demeanor of the witnesses and judge their veracity—the appellate court does not. The reason for the rule disappears, however, when the appeal is presented upon no more than pleadings and affidavits, as is the case here. This court has held that a statement of a trial court denominating as a finding that which is in the nature of a legal conclusion from undisputed evidence may be disregarded by us. *Weigell* v. *Gregg* (1915), 161 Wis. 413, 154 N. W. 645, that a finding upon practically undisputed evidence is not as conclusive as it is in cases where there is a conflict of evidence, *Saylor* v. *Marshall & Ilsley Bank* (1937), 224 Wis. 511, 272 N. W. 369, that where the question presented is one of applying the law to the undisputed facts we are not bound by the trial court's findings, *Dairy Queen of Wisconsin, Inc.* v. *McDowell* (1952), 260 Wis. 471, 51 N. W. (2d) 34, and in *Will of Mechler* (1944), 246 Wis. 45, 55, 16 N. W. (2d) 373, we said that:

"Generally, the rule applicable to findings of fact made by the trial court does not apply where there are

> no disputed questions of fact because the reason for the rule itself fails. (In a certain class of cases inferences are said to be within the rule.) The reason for the rule is that fact finding is primarily a function of the trial court while on appeal this court deals mainly with questions of law. The position of the trial court for the determination of factual questions is obviously superior to that of the appellate court, in that the trial [fol. 54] court has an opportunity to observe the witnesses, note their demeanor, the manner in which they testify, their intelligence or lack of it, and many other intangible things which it is impossible to place upon a court record. None of these considerations apply to a determination of a court made upon undisputed facts where the interpretation of a written instrument is under consideration. The reason for the rule failing, the rule itself fails."

We see no distinction between the case where the court is called upon to deal with or construe a written instrument and where, as here, the court is required to study only pleadings and affidavits.

Pappas v. Stacey, supra, was a case strikingly similar in facts. There was peaceful picketing conducted for the purpose of seeking to organize non-union employees. There was no dispute between the employer and his employees. The plaintiff had suffered and would continue to suffer in his business as a result of the picketing. The court held that the picketing was conducted for an unlawful purpose, in violation of a statute which contains provisions quite similar to those with which we are concerned, and which read as follows:

> "Workers shall have full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons. . . ."

The parties had stipulated that the picketing was conducted for the sole purpose of seeking to organize em-

ployees of the plaintiff but the court supplied the finding, as we do here, that the purpose of the picketing was to coerce the employer to bring pressure upon the employees to join the Union, and that compliance with the pressure [fol. 55] so exerted would result in a violation of the statute as being interference with the right of the employees to choose their own representatives. The court held that the restraint of the picketing by the lower court would not abridge the right of free speech under the federal constitution. The court was careful to point out that although the case was one to be treated as involving an unlawful strike, the same result would have to be reached if only picketing were involved.

We quote at some length from the opinion of the court because we believe that its expression is a sufficient answer to the contention of the Union and because its language is clearly applicable to our problem. Among other things the court said:

> "Under the statute . . . the employee, or worker, is protected from 'interference, restraint or coercion by their employers or other persons. . . .' The worker must be left free from interference by employer or other persons in reaching a decision whether to join or refrain from joining a union. It follows necessarily that pressure cannot lawfully be directed against the employer to force him to interfere with the free choice of his employees. The plaintiff cannot lawfully be placed in a position where compliance with the strikers' demands requires action in violation of the law of the State.
>
> "This is, however, precisely what the strikers here seek to accomplish. In brief, the strike for organizational purposes is unlawful for it is by its very nature destructive of the protection for the employees provided by the statute. . . .
>
> "A coercive force is generated by the picketing to secure new members for the union. It is apparent that this force is applied to the employer to urge his employees to join the union to save his business, and to the employees to join to save their livelihood.
>
> "In reaching for the employees, there is a steady and

exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the requests of the union. . . .

"The purpose of the picketing here, that is the immediate purpose, is solely to bring employees into Local [fol. 56] 390. We are not interested in the ultimate form of the relations between the plaintiff and his employees. . . .

" statute, [to which we have referred], is a solemn declaration of the public policy of our State. It is the law, duly enacted by the Legislature, which must govern the decision in this case. Within the plain and clear meaning and intent of the statute we find, as we have indicated, a public policy against peaceful picketing at the place of business for organizational purposes. In our opinion the restraint of such picketing does not abridge the right of free speech under the decisions of the Supreme Court."

It is worthy of note that an appeal was taken to the United States Supreme Court. There is no record of the Federal court's action except an entry in its journal, as follows:

"The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas would note probable jurisdiction."

It would appear from this entry that the court dismissed the appeal because no federal question was presented, suggesting that the court did not consider itself bound by the rule of the *Swing* case which, when this case was first studied by us, we considered as requiring reversal.

The defendants contend that we may not be concerned with the fact that the picketing has caused a loss to plaintiff. We may concede that workmen's infliction of incidental damage to others by use of lawful methods of action in the field of labor does not warrant injunctive relief. Counsel have called our attention, however, to no authority, nor have we been able to find one, for the proposition that the

courts must close their eyes to the loss where the conduct which causes the loss constitutes a violation of a statute, as we find in the case here.

We conclude that the picketing was conducted for an [fol. 57] unlawful purpose and that, therefore, the trial court properly enjoined it.

Our decision is not to be construed as holding that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the *Swing* case.

By the court.—The original mandate herein is vacated and a mandate substituted affirming the judgment.

[fol. 58] [File endorsement omitted.]

CURRIE, J. (DISSENTING) I must respectfully dissent from the majority opinion filed upon the rehearing granted in this case because neither the briefs of counsel, nor anything stated in the new opinion, convince me that our original opinion was erroneous. I would adhere to such original opinion except in the one minor respect hereinafter mentioned.

There is much stated in the new opinion with which I fully concur although disagreeing with the final result determined therein. Before touching upon the area of dissent it would seem advisable to list the matters as to which there is complete agreement. These are:

(1) While the wording on the signs carried by pickets constitutes the exercise of free speech, the physical presence of the pickets makes picketing something more than free speech.

[fol. 59] (2) Because picketing does embrace more than free speech, any state has the right to regulate or prohibit the same when carried on with respect to a business, whose labor relations are not subject to federal regulation under the Taft-Hartley Act, if conducted to achieve an unlawful objective; and in exercising such right the state does not violate the provisions of the First and Fourteenth amendments to the United States constitution.

(3) Picketing, which is conducted for the purpose of co-

ercing or inducing an employer in such a business to interfere with the right of his employees to join any labor organization of their own choosing, or to refrain from so doing, is for an unlawful objective in that it violates the provisions of sec. 111.06 (2) (b), Wis. Stats.

(4) Where a question of fact is presented on an appeal to this court as to whether peaceful picketing was conducted for an unlawful objective, and no parol testimony had been taken before the trial court but instead the proof in the record consists solely of affidavits or stipulated facts, this court is not concluded by findings of the trial court based upon inferences drawn from such affidavits or stipulated facts but is free to draw its own inferences from such record.

The trial judge in the instant case expressly found "that the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's [sic]." The request of plaintiff's counsel for an express finding that the picketing had been carried on for the purpose of coercing or inducing the plaintiff employer to interfere with the rights of its employees to join or not join the defendant unions, was denied. Plaintiff had expressly pleaded that the picketing violated sec. 111.06 (2) (b) so that such requested finding was in keeping with such allegation. This [fol. 60] court in its original opinion expressly determined that "*the testimony would not have supported a finding of the facts constituting a violation of either of the subsections*" [sec. 111.06 (2) (a) or 111.06 (2) (b)]. See p. 319 of the original opinion.

Plaintiff at no time pleaded that the picketing constituted a violation of sec. 111.06 (2) (a),[1] a fact which was again

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[1] Sec. 111.06 (2) (a), Stats., reads:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family."

conceded in plaintiff's brief on rehearing. Therefore, for the purpose of this appeal, sec. 111.06 (2) (a) should not have been referred to in our original opinion nor is it proper to consider its possible application on the rehearing. Plaintiff's right to an injunction restraining the picketing must stand or fall on the issue of whether the picketing violated sec. 111.06 (2) (b).

We come now to an analysis of the facts appearing in the record. No demand was ever made by or in behalf of the defendants upon the employer for union recognition or otherwise. The defendant unions had, however, made persistent efforts by personal solicitation to induce plaintiff's employees to join the defendant unions which efforts failed. These efforts to organize were then followed by the peaceful picketing. The drivers of trucks of other employers refused to cross the picket line to haul plaintiff's product or to make delivery of materials to plaintiff's gravel pit, thereby causing damage to the plaintiff.

[fol. 61] As pointed out in the majority opinion, the picketing was conducted at a spot out in the country where there was little travel by the public. This permits of the reasonable inference that the picketing was not for the purpose of disseminating information to the general public. The two remaining conceivable objectives are: (1) to attempt to induce plaintiff's employees to join the defendant unions; or (2) to coerce the plaintiff employer into taking some affirmative action of a coercive nature to induce its employees to join the defendant unions. It is only if the last of these two alternatives is found to be the purpose of the picketing that an injunction may be entered restraining the picketing because plaintiff so limited the issue by its pleadings and its contentions in the trial court.

The mere fact that some damage resulted to the plaintiff employer from the picketing does not establish that the picketing was for an unlawful purpose. *Wisconsin E. R. Board* v. *Retail Clerks Int. Union* (1953), 264 Wis. 189, 194, 58 N. W. (2d) 655; *Painters & Paperhangers Local U.* v. *Roadtree Corp.* (1952), 194 Va. 148, 72 S. E. (2d) 402, 405. The facts that the defendants prior to the picketing had attempted by personal solicitation to induce the employees to join the defendant unions while no demand whatsoever

was ever made upon the plaintiff employer, strongly supports the inference drawn by the learned trial judge that the picketing was for the purpose of inducing some conduct on the part of the employees. This seems to me to be a more reasonable inference than that its objective was to cause the employer to engage in the unlawful activity prohibited by sec. 111.06 (2) (b).

The inference which the majority of the court draws from these acts of solicitation of the employees prior to the picketing runs exactly counter to the reasoning of the Missouri court in *Bellerive Country Club* v. *McVey* (Mo. 1955), 284 S. W. (2d) 492. In that case, as in the instant case, the plaintiff employer sought to enjoin peaceful picketing on the ground that its objective was to seek to coerce [fol. 62] the employer to take action to force its employees into the union doing the picketing, thereby rendering such objective unlawful under Missouri law. About a year prior to the picketing the union contacted the plaintiff country club and asked permission to come upon the club's property to talk to the employees in order to induce them to join the union. This request was denied. In the year which ensued between such request and the picketing, the union made no attempt to contact the employees in any way to induce them to join. The picketing was instituted on the opening day of the Western Open Golf Tournament at the club and as a result deliveries of such items as beer and soft drinks were immediately cut off because of the refusal of truck drivers to cross the picket line, and a union orchestra refused to play at a scheduled club dance. One of the reasons advanced by the Missouri courts in holding that the picketing was for an unlawful objective, was the failure of the union to have undertaken any solicitation of the employees for union membership prior to the picketing. The majority opinion in the instant case, on the other hand, bases its inference of unlawful objective (to cause the plaintiff employer to take action to force its employees into the defendant unions) on the fact that the unions had prior to the picketing solicited the employees for membership but such prior organizing activities had been unsuccessful.

It is elementary that the burden of proving an unlawful

purpose in the instant case is upon the plaintiff. 20 Am. Jur., Evidence, p. 1043, sec. 1189, states:

> "To establish a theory by circumstantial evidence, the known facts relied upon as a basis for the theory must be of such nature and so related to each other that the only reasonable conclusion to be drawn therefrom is the theory sought to be established. *A fact is not proved by circumstances if they are merely consistent with its existence or if other inferences may reasonably be drawn from the facts in evidence.*" (Emphasis supplied.)

[fol. 63] Applying the above stated principle to the instant case, I feel that this court should uphold the inference drawn by the trial court, viz., that the objective of the picketing was for organizational purposes to induce the employees to join the defendant unions.

There is an even more compelling reason why an injunction should not be grounded in this case on any application of the provisions of sec. 111.06(2) (a) than the fact that such issue was not raised in the trial court or in this court until the motion for rehearing. Such further reason is that there is a grave doubt as to whether peaceful organizational picketing conducted at a place of employment solely for the purpose of inducing employees to join a union can ever be held to constitute a violation of sec. 111.06 (2) (a). To seek to induce employees to join a union is a *lawful objective.* In order for this court to hold that peaceful organizational picketing may be prohibited as a violation of sec. 111.06 (2) (a), it, therefore, necessarily follows that we would have to find that *the means and not the objective was unlawful.*

Thus far the United States Supreme court has only upheld the right of a state to prohibit peaceful picketing when the picketing was conducted for an *unlawful objective.* It has never held that peaceful picketing may be enjoined as *an unlawful means to attain a lawful objective.* The dismissal by that court of the appeal from the judgment of the Main court in *Pappas v. Stacey* (Me. 1955), 116 Atl. (2d) 497, cannot be construed as upholding the right of a state to prohibit peaceful organizational picketing. In

the *Pappas* Case, three employees of the plaintiff employer had gone on strike in an attempt to induce the employer to recognize the union and joined in the picketing. This in itself afforded adequate proof that the picketing had the unlawful objective of seeking to cause the employer to [fol. 64] take action to coerce his employees into joining the union and the court so held. In addition, the court also held that even if the picketing were solely for organizational purposes it could be enjoined. Thus the decision found that the picketing could be enjoined on two grounds, the first of which had been upheld by prior decisions of the United States Supreme Court, and the second of which has not been.

The United States Supreme Court does not considerr that an appeal presents a substantial federal question if the issue raised has been directly passed upon in its prior decisions. Stern & Gressman, Supreme Court Practice (2d), p. 81, and *Palmer Oil Corp.* v. *Amerada Corp.* (1952), 343 U. S. 390, 72 Sup. Ct. 842, 96 L. Ed. 1022. Such court also will not review a state court judgment based upon two or more grounds, one of which presents no substantial federal question. Stern & Gressman, p. 94, G, and note in 95 U. of Pa. L. Rev. (1947), 764, entitled "Supreme Court Review of State Court Decisions Involving Multiple Questions".

Because of the gravity of the problem of whether peaceful organizational picketing may be enjoined as a violation of sec. 11.06 (2) (a), this court should not pass on such question until the issue has been properly raised in the trial court and the issue has been fully briefed and argued here. Neither was done in the instant case.

[fol. 65] [SEAL.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2224-4)